FILED

99 195 JUL 29 1999

OFFICE OF THE CLERK

No. ——

IN THE

Supreme Court of the United States

A.B. CHANCE COMPANY,
a subsidiary of EMERSON ELECTRIC COMPANY,
Petitioner,

v.

JERRY ALLEN ENFIELD, by and through his Conservator and Natural Mother, MAE ENFIELD,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN M. KOBAYASHI *
SUSAN G. PRAY
MICHELE R. LAMONTAGNE
BENNETT L. COHEN
THE KOBAYASHI LAW FIRM, P.C.
1633 Fillmore Street
Denver, CO 80206
(303) 399-2100
Counsel for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

5498

QUESTION PRESENTED

In light of the split in the circuit courts of appeal in their approaches to applying the doctrine of *stare decisis* to federal precedent predicting state law, did the Tenth Circuit Court of Appeals err when it arrogated to itself the power to invent a "strict duty of care" rule of absolute liability foreign to Kansas state products liability law, refused to certify the issue of the correctness of its construct to the Supreme Court of Kansas or re-examine the accuracy of its construct, but instead summarily followed its own created precedent pursuant to its principles of *stare decisis*, in violation of the commands and fundamental principles of federalism articulated by this Court in *Erie R.R. Co. v. Tompkins* and refined in *Salve Regina College v. Russell*?

STATEMENT OF PARTIES

The party to this proceeding whose judgment is sought to be reviewed is Petitioner A.B. Chance Company. At the time of the manufacture of the product at issue, A.B. Chance Company was a subsidiary of Emerson Electric Company, which is also named in the caption of this case. Emerson was dismissed from these proceedings upon representation that it would indemnify and pay any part of the underlying judgment not paid by A.B. Chance Company. *See* Appendix E hereto at pages 15a-16a. Emerson Electric Company has since sold A.B. Chance Company, but continues to represent its interests as its indemnitor.

The current parent companies of A.B. Chance Company are A.B. Chance Industries, Inc., which is owned by Hubbell Power Systems, Inc., which is in turn owned by Hubbell, Inc. Only Hubbell, Inc. is a publicly traded company. There are no other publicly held companies which own 10% or more of A.B. Chance Company's stock.

Emerson Electric Company has no parent companies, and there are no publicly held companies which own 10% or more of Emerson Electric Company's stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
STATEMENT OF THE CASE	2
A. Factual Background	2
B. Procedural Background	3
REASONS FOR GRANTING THE WRIT	7
I. THE TENTH CIRCUIT CASUALLY CREATED AND SUBSEQUENTLY EMBEDDED ITS ERRONEOUS INVENTION OF KANSAS' STRICT LIABILITY LAW	9
II. THE PROMULGATION AND ENTRENCHMENT OF THE SPURIOUS STANDARD IN FEDERAL COURT OPINIONS VIOLATES THE COMMANDS AND PRINCIPLES OF *ERIE*	12
A. The Failure to Correct the Tenth Circuit's Prior Error in Interpreting Kansas Law Will Encourage and Reward Forum Shopping	13
B. The Failure to Correct the Tenth Circuit's Erroneous Interpretation of Kansas Law Will Result in Inequitable Administration of the Laws	14

TABLE OF CONTENTS—Continued

Page

III. THE TENTH CIRCUIT'S DECISION DEMONSTRATES THE CONFLICTING AND IMPROPER STANDARDS APPLIED BY THE CIRCUIT COURTS OF APPEAL TO THE APPLICATION OF *STARE DECISIS* TO *ERIE*-PREDICTIVE PRECEDENT IN VIOLATION OF THIS COURT'S DIRECTIVES IN *SALVE REGINA COLLEGE* 16

A. The Tenth Circuit Improperly Applied *Stare Decisis* to Affirm Its Erroneous *Erie*-predictive Precedent in the Face of Contrary State Authority 17

B. The Circuits Are Divided and Generally Afford Too Much Deference to Their Prior Predictive Opinions, in Violation of This Court's Guidance in *Salve Regina College*.... 19

IV. THE TENTH CIRCUIT'S CAVALIER STANCE THAT IT MAY INVENT STATE LAW, SUBJECT ONLY TO EXPRESS CORRECTION OF THE KANSAS COURTS, VIOLATES FUNDAMENTAL PRINCIPLES OF FEDERALISM 27

CONCLUSION 30

APPENDIX 1a

TABLE OF AUTHORITIES

CASES — Page

A.I. Trade Finance, Inc. v. Petra Intern. Banking Corp., 62 F.3d 1454 (D.C. Cir. 1995) 28
Alden v. Maine, —— S. Ct. ——, 1999 WL 412617 (June 23, 1999) 28
Batts v. Tow-Motor Forklift Co., 66 F.3d 743 (5th Cir. 1995) 23, 25
Bishop v. Wood, 426 U.S. 341 (1976) 16
Blaine Const. Corp. v. Ins. Co. of North America, 171 F.3d 343 (6th Cir.), *reh'g denied* (1999) 24
Erie R.R. Co v. Tompkins, 304 U.S. 64 (1938) ..... *passim*
F.D.I.C. v. Abraham, 137 F.3d 264 (5th Cir. 1998) 23
F.D.I.C. v. McSweeney, 976 F.2d 532 (9th Cir. 1992) 24
Garst v. General Motors Corp., 484 P.2d 47 (Kan. 1971) 5
Green v. United States, 356 U.S. 165 (1958) 25
Guaranty Trust Co. v. York, 326 U.S. 99 (1945) 14
Hanna v. Plumer, 380 U.S. 460 (1965) 13, 28
Hardin v. Manitowoc-Forsythe Corp., 691 F.2d 449 (10th Cir. 1982) 6, 9
Hill v. Bank of Colorado, 648 F.2d 1282 (10th Cir. 1981) 25
In re Jones, 18 B.R. 161, 164 (Bankr. W.D.Ok. 1982) 26
Jenkins v. Amchem Products, Inc., 886 P.2d 869 (Kan. 1994) 5, 10, 13, 14, 15
Matter of McLinn, 739 F.2d 1395 (9th Cir. 1984) .. 15
McKenna v Ortho Pharmaceutical Corp., 622 F.2d 657 (3rd Cir. 1980) 18
Meredith v. City of Winter Haven, 320 U.S. 228 (1943) 29
Miller v. Lee Apparel Co., Inc., 881 P.2d 576 (Kan. App. 1994) 5
Mills by Mills v. Smith, 673 P.2d 117 (Kan. App. 1983) 11, 17
Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917 (10th Cir. 1984) 28
Moore v. Sims, 442 U.S. 415 (1979) 8, 20

TABLE OF AUTHORITIES—Continued

Page

Prince v Leesona Corp., 720 F.2d 1166 (10th Cir. 1983) 6, 10, 11, 14, 17
Printz v. United States, 521 U.S. 98 (1997) 28
Salve Regina College v. Russell, 499 U.S. 225 (1991) ..... *passim*
Smith v. Calgon Carbon Corp., 917 F.2d 1338 (3rd Cir. 1990) 22
Sperry - New Holland v. Prestage, 617 So.2d 248 (Miss. 1993) 24
Timsah v. General Motors Corp., 591 P.2d 154 (Kan. 1979) 5, 13
United States v. Brooks, 161 F.3d 1240 (10th Cir. 1998) 6
United States v. Lopez, 514 U.S. 549 (1995) 28
Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941) 15
Wheeler v. John Deere Co., 862 F.2d 1404 (10th Cir. 1988) 6, 11, 17, 18, 29
Woodling v. Garrett Corp., 813 F.2d 543 (2nd Cir. 1987) 22, 26

STATUTES

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1332 2

RESTATEMENTS OF THE LAW

Restatement (Second) of Torts § 402A 4, 5, 6

OTHER AUTHORITIES

Howard B. Abrams & Gregory Gelfand, *Putting Erie on The Right Track*, 49 U. Pitt. L. Rev. 937 (1988) 29
Jed I. Bergman, *Putting Precedent in Its Place: Stare Decisis and Federal Predictions of State Law*, 96 Columbia Law Review 969 (1996) 21, 24, 26
Craig A. Hoover, *Deference to Federal Circuit Court Interpretations of Unsettled State Law: Factor Etc., Inc. v. Pro Arts, Inc.*, 1982 Duke L.J. 704 30

IN THE

Supreme Court of the United States

No. ———

A.B. CHANCE COMPANY,
a subsidiary of EMERSON ELECTRIC COMPANY,
Petitioner,

v.

JERRY ALLEN ENFIELD, by and through his Conservator and Natural Mother, MAE ENFIELD,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, A.B. Chance Company, through its indemnitor, Emerson Electric Company, and its counsel, The Kobayashi Law Firm, P.C., respectfully prays that a writ of certiorari issue to review the judgment and opinion of a Panel of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on April 7, 1999. The Tenth Circuit opinion so far departs from the accepted and usual course of judicial proceedings in ignoring the commands of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) and *Salve Regina College v. Russell*, 499 U.S. 225 (1991), as to call for an exercise of this Court's supervisory power. Also, the Tenth Circuit opinion illustrates the conflicting differences among the circuit courts of appeal in their application of *stare decisis* to

federal *Erie*-predictive precedent, which differences should be uniformly resolved by this Court.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit filed April 7, 1999, that gives rise to this petition, is reprinted in Appendix A ("App. A") hereto at pages 1a-10a. The Petition for Rehearing was denied by the Panel on April 30, 1999, and its Order is reprinted in Appendix B hereto at page 11a.

JURISDICTION

The United States District Court, District of Kansas, had diversity jurisdiction over this action pursuant to 28 U.S.C. § 1332. Final judgment in the amount of $1,733,002.00 for Respondent was entered on November 10, 1997, upon a jury verdict against Petitioner A.B. Chance. Petitioner timely appealed the judgment to the Tenth Circuit Court of Appeals on December 10, 1997. The Tenth Circuit affirmed the judgment in an Order and Judgment dated April 7, 1999, and denied Petitioner's timely-filed Motion for Rehearing on April 30, 1999. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of the petition for rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Factual Background

Respondent Jerry Allen Enfield ("Enfield") was injured in 1992 by a utility pole that broke and fell on him while it was being removed from the ground. Enfield was working for the City of Goodland, Kansas (the "City"), which was using a Pitman Polecat digger-derrick ("Polecat") owned by the City to pull utility poles out of the ground. The injury occurred when the boom of the Polecat, manu-

factured by Petitioner A.B. Chance, collapsed while the pole was being removed.

The City workers ignored the use and safety instructions which accompanied the Polecat. The workers improperly used the Polecat to remove utility poles by rocking them back and forth to loosen them and then lifting them with the winch, rather than by drilling a hole with an auger beside the poles to loosen them and then pulling them out with the lift cylinder, as instructed. The City had also replaced the bolts and washers which held the turntable bearing to the pedestal with bolts that were the wrong length, and with unhardened washers—also contrary to the manufacturer's express instructions.

Enfield's injury occurred when the improper bolts that fastened the Polecat's turntable bearing to the pedestal of the Polecat broke, causing the boom to separate from the pedestal. The weight of the collaping boom snapped the utility pole, causing it to fall on Mr. Enfield.

B. Procedural Background

Mr. Enfield brought this personal injury products liability diversity action based on Kansas law in September, 1994. This case was submitted to a jury on three ostensible theories of Kansas common law liability: negligence, strict liability, and a "strict duty of care."[1] The district court gave instructions which correctly stated Kansas' law of negligence and strict liability. The district court, however, also gave an erroneous instruction on a manufacturer's "strict duty of care," unsupported by any Kansas case law or pattern jury instruction, which effectively made A.B. Chance Respondents' casualty insurer.

---

[1] As discussed *infra*, this "strict duty of care" theory of liability was an invented and erroneous theory of absolute liability with no basis in Kansas law, the impropriety of which underlies this certiorari petition.

The district court properly took its negligence instruction directly from Pattern Instruction Kansas 3d (PIK3d) § 128.01. This instruction repeatedly emphasized that negligence is measured by what is reasonable under the circumstances and foreseeable by the defendant.[2]

Just as the negligence instruction properly emphasized the touchstone of reasonable care, the strict liability instruction emphasized the quintessential concept of Restatement (2nd) of Torts § 402A and the Kansas law of strict liability—that the product be defective and unreasonably dangerous. The strict liability instruction was taken verbatim from PIK3d § 128.17.[3] Both the official

---

[2] The negligence instruction stated:

> Negligence is the lack of ordinary care under the circumstances. As applied to the manufacture, distribution, and sale of a product, it means the failure of a manufacturer or seller to do something that a reasonably careful manufacturer or seller engaged in the same business would do, or the doing of something by a manufacturer or seller that a reasonably careful manufacturer or seller engaged in the same business would not do. The degree of care must be equal to the danger reasonably to be anticipated, measured by all the facts and circumstances.

[3] The strict liability instruction stated:

> A manufacturer who sells a product in a defective condition which is unreasonably dangerous to the user is subject to liability for physical harm thereby caused to the ultimate user. . . .
>
> A product is in a defective condition if it has defects in design, manufacturing, or instructions, and such defects existed at the time the product left the manufacturer's hands.
>
> A defective condition is unreasonably dangerous if it is dangerous when used in the way it is ordinarily used considering the product's characteristics and common usage, and is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it, with ordinary knowledge common to the community as to its characteristics.

The jury had before it ample evidence that any alleged "defective condition" of the Polecat was caused by the City.

comment to this pattern instruction and the Kansas Supreme Court emphasize the importance of the requirements that the product be proven to be both defective and unreasonably dangerous in order to state a cause of action for strict liability. *See, e.g., Jenkins v. Amchem Products, Inc.*, 886 P.2d 869, 886 (Kan. 1994).

Over the objection of A.B. Chance, the trial court also gave the following erroneous and contradictory instruction on the duty of care.

> A manufacturer has a *strict duty of care* in design and production, *including the duty to guard against injury to ordinary and even negligent consumers.* If you find defendant breached this duty, you may consider it in determining the comparative fault of the parties. (emphasis added)

See Appendix C hereto at page 12a.

This instruction is a creature completely foreign to Kansas law. There is no Kansas law to be found which recognizes or even mentions such a duty, or anything even vaguely similar. Indeed, this "strict duty of care" concept is functionally identical to absolute liability, because it imposes unconditional strict liability without reference to the quintessential concept of product defect, *see, e.g., Jenkins,* 886 P.2d at 887-89 (a specific defect in a product must be estabilshed to prove strict liability claim), but is based solely on the occurrence of injury—even where the injury is caused by the user's own negligence. The erroneous absolute liability instruction transformed A.B. Chance into Respondents' personal casualty insurer, contrary to Kansas law and the Restatement (2nd) of Torts § 402A.[4]

---

[4] *See, e.g., Timsah v. General Motors Corp.*, 591 P.2d 154, 162 (Kan. 1979) ("Manufacturers and sellers are not insurers of the safety of persons in the use of the product."); *Garst v. General Motors Corp.*, 484 P.2d 47, 61 (Kan. 1971) (a manufacturer "is not an insurer that its product, from a design standpoint, be accident-proof or incapable of producing injury"). *Accord Miller v. Lee*

The jury found Petitioner A.B. Chance 50% responsible for Mr. Enfield's injuries, and final judgment was entered against it in the amount of $1,733,002 with interest. *See* Appendices D and E hereto at pages 13a-16a.

On appeal, the Tenth Circuit did not rule on A.B. Chance's motion to certify the question of the accuracy of the "strict duty of care" language for decision by the Kansas Supreme Court. Instead, the Tenth Circuit Court of Appeals summarily affirmed the District Court's use of the erroneous "strict duty of care" instruction with a brief reference to earlier Tenth Circuit opinions which had in *dicta* created and then embedded the spurious language which conceived and gave birth to this illegitimate "strict duty of care" instruction:

> A.B. Chance contends that the district court erred in instructing the jury that a manufacturer has a a "strict duty of care" because the instruction improperly states Kansas law. However, this court has previously found that Kansas strict liability law includes such a duty and has upheld similar jury instructions. *See Wheeler*, 862 F.2d at 1412; *Prince v. Leesona Corp.*, 720 F.2d 1166, 1171 n.9 (10th Cir. 1983); *Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449, 455 (10th Cir. 1982). Under the principles of *stare decisis*, we must abide by these holdings. *See United States v. Brooks*, 161 F.3d 1240, 1247 (10th Cir. 1998). In light of this court's previous holdings and after analyzing the instruction as a whole, we find that this instruction adequately reflects Kansas law.

App. A at p. 7a.

Apparel Co., Inc., 881 P.2d 576, 588 (Kan. App. 1994); Restatement (2nd) of Torts § 402A, comment g (requirement of provable defect entails that manufacturer is not an insurer for all physical injuries caused by its products).

The Tenth Circuit again ignored Petitioner's request to certify the issue to the Kansas Supreme Court in summarily denying the Motion for Rehearing.

REASONS FOR GRANTING THE WRIT

If the Tenth Circuit Court of Appeals had erroneously interpreted existing state law, then the opinion below might be one of the thousands that this Court declines to review each year as "merely wrong." Here, however, the court of appeals has done much more than commit an inexcusable error under the rule of *Erie R.R. Co. v. Tompkins*—it has taken upon itself the role of inventing through a footnote of *dicta* an entirely new rule of Kansas law, then bootstrapping that rule by subsequent affirmance through summary and thoughtless application of *stare decisis*, subject only to express correction by Kansas courts. Creation of such a creature exceeds any innocent *Erie* error by doing violence to the fundamental principles of federalism articulated by *Erie*. Also, the court of appeals' summary reliance on its own *Erie*-predictive precedent in the face of evidence of contrary state law demonstrates the disparate approaches among the circuit courts of appeal to this issue, most of which inaccurately and inappropriately defer to their own *Erie*-predictive precedent at the cost of failing to maintain doctrinal coherence with state law. *See Salve Regina College v. Russell*, 499 U.S. 225, 234 (1991).

The Tenth Circuit Court of Appeals created from whole cloth a "strict duty of care" in products liability cases which functionally makes every manufacturer subject to jurisdiction in Kansas absolutely liable as a casualty insurer. Kansas law recognizes no such duty. Because the erroneous statement of Kansas law was made in a Tenth Circuit opinion, however, federal courts within the Tenth Circuit continue to rely on this misinterpretation rather than look to appropriate sources such as the Kansas courts

for the definitive statements of Kansas strict liability law. The result is two different bodies of ostensible Kansas strict liability law: actual Kansas law (which imposes a duty upon manufacturers to keep defective products out of the stream of commerce), and an erroneous version of Kansas law applied in federal courts in diversity (which saddles manufacturers with absolute liability for any injury related to their products). This is precisely the sort of situation which *Erie* and *Salve Regina College* sought to eliminate.

The error of the court of appeals in the instant case cuts even more deeply by striking at the heart of this Court's recently reiterated profound respect for principles of federalism. When confronted with its undeniable *Erie* error, the Tenth Circuit did not re-evaluate its prior misconstruction of Kansas law in light of the proper sources of that law, or request the Kansas Supreme Court to determine the correct statement of applicable state law. Like some other circuit courts of appeal, the Tenth Circuit improperly held that it was bound by its prior *Erie*-predictive precedent, despite the fact that federal *Erie* predictions have no binding precedential value. *See, e.g., Moore v. Sims*, 442 U.S. 415, 428 (1979).

Indeed, the Tenth Circuit arbitrarily announced that it would continue to follow its own prior misinterpretations of state law unless and until the Kansas courts choose to intervene. This is an erroneous usurptation of state authority which so far departs from proper judicial practice as to require correction by this Court. Also, the disparity among the circuits in the extent to which they permit a reflexive, but improper, adherence to *stare decisis* to outweigh *Erie*'s goal of doctrinal coherence with state law calls for review and uniformity which can only be provided by a decision from this Court.

I. THE TENTH CIRCUIT CASUALLY CREATED AND SUBSEQUENTLY EMBEDDED ITS ERRONEOUS INVENTION OF KANSAS' STRICT LIABILITY LAW.

To understand the extent to which the Tenth Circuit's error violates both *Erie* and basic principles of federalism, it is necessary to review how the erroneous "strict duty of care" was born and then became embedded in federal court opinions.

The Tenth Circuit's analysis of Kansas' strict liability law began on sound footing in *Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449, 455 (10th Cir. 1982). There, the Tenth Circuit carefully harmonized Kansas caselaw incorporating comparative fault principles into the Kansas law of strict liability:

> As we interpret the collective thrust of the Kansas cases, it appears that Kansas in effect treats each kind of traditional tort liability as a departure from a defined duty whether that departure is in the nature of breach of warranty, routine neglect, failure to warn, or placing a defective and unreasonably dangerous product in the stream of commerce even though reasonable care was taken in its manufacture. The latter type of departure is the most difficult to conceptualize in relation to ordinary negligence. The *only* way to harmonize the Kansas cases is to assume that manufacturers (and others in the stream of commerce) have an *absolute duty not to put defective products in the stream of commerce* if they reasonably can foresee use which might result in injury.

Hardin, 691 F.2d at 455 (emphasis added). *Hardin* correctly recognized that the duty which Kansas' law of strict liability imposes upon a manufacturer is to keep defective and unreasonably dangerous products out of the stream of commerce. Kansas' law of strict liability does *not*

require manufacturers unconditionally to "guard against injury to ordinary and even negligent consumers," regardless of the nature of the product at issue, contrary to the district court's instruction affirmed by the Tenth Circuit in this case. *See* Appendix C.

Then, in *Prince v. Leesona Corp.*, 720 F.2d 1166 (10th Cir. 1983), the Tenth Circuit ignored its accurate reading of Kansas law in *Hardin*, and, in *dicta* and in a footnote, created the "strict duty of care" rule *ex nihilo*:

> In essence, what Kansas has done is to let the jury determine the degree to which each actor has departed from his or her respective duty[9] and apportion fault accordingly. . . .
>
> ---
>
> [9] Each actor's departure is measured from their respective duty of care. ***Manufacturers have a strict duty of care in design and production, including the duty to guard against injury to ordinary and even negligent consumers.***

Prince, 720 F.2d at 1171 and n.9 (emphasis added).

The emphasized sentence in footnote nine of the *Prince* opinion became the source of a theretofore unknown and unsupported rule of Kansas strict liability law. In this footnote of *dicta*, the *Prince* Panel casually and carelessly invented this wholly new standard of liability without reference to any Kansas authority. No Kansas court has ever described or considered any such duty. Not one Kansas case makes reference to such a "strict duty of care," or to this part of the *Prince* opinion. In fact, *Prince*'s *dicta* in footnote nine is expressly contrary to Kansas strict liability law. *See Jenkins v. Amchem Products, Inc.*, 886 P.2d 869, 887-89 (Kan. 1994) (a specific defect in a product must be established to prove a strict liability claim). Kansas courts have, however, cited with

approval to the Tenth Circuit's earlier and contrary analysis in *Hardin, supra. See Mills by Mills v. Smith,* 673 P.2d 117, 120-21 (Kan. App. 1983).

Once the Tenth Circuit had invented this new rule of state law, federal district courts began applying it in diversity cases when instructing juries on Kansas strict liability law. As a result, the Tenth Circuit was soon presented with another case pointing out the error committed in *Prince,* and repeated by the district courts.

In *Wheeler v. John Deere Co.,* 862 F.2d 1404 (10th Cir. 1988), the Tenth Circuit was directly presented with the question of whether the "strict duty of care" footnote in *Prince* was an accurate statement of Kansas law, or an aberration. The *Wheeler* Panel responded by offering a cautionary footnote that federal district courts sitting in diversity should not rely on *dicta* from federal appellate opinions for formulations of state law to use in jury instructions. *Wheeler,* 862 F.2d at 1412, n.5. The *Wheeler* Panel then announced that the "strict duty of care" *dicta* from *Prince* appeared to be a close enough approximation of Kansas law, at least "until the Kansas courts tell us otherwise." Id. at 1412-13.[5]

For the next decade, no Kansas court told the Tenth Circuit otherwise, because no Kansas court was ever presented with the issue of the accuracy of the Tenth Circuit's misguided language in *Prince.* Given that Kansas has already approved the Tenth Circuit's analysis in *Hardin* in *Mills by Mills v. Smith, supra,* there is no reason why a Kansas court would ever address the question whether *Prince* is a correct statement of Kansas law of strict liability, unless specifically requested to do so by the Tenth Circuit. Because in this case the Tenth Circuit

---

[5] The *Wheeler* Panel chose to follow the *dicta* in *Prince* rather than re-examine the issue despite the *Prince* Panel's acknowledgment that Kansas strict liability law was in a "state of transition." *Prince v. Leesona Corp.,* 720 F.2d at 1171.

did not rule on Petitioner's request to certify the issue to the Kansas Supreme Court, it is unlikely that the Tenth Circuit's misformulation of Kansas law will ever be corrected unless this Petition is granted.

The case at bar is the latest in the series of federal decisions which continue the misinterpretation of Kansas law. In the present opinion, the Tenth Circuit again refused to consider the accuracy of its "strict duty of care" rule, preferring instead to deal with the challenge by a summary reference to its own prior cases of *Prince* and *Wheeler,* and to general principles of *stare decisis.* App. A at 7a. In so doing, the Tenth Circuit has again profoundly misconstrued its duty under *Erie* to accurately determine state law in the same manner that a state court would—not by summary reference to its own prior *Erie*-predictive precedents (especially those which are inaccurate and lack any basis in state law), but by examining the proper sources of state law, such as state supreme court and intermediate appellate court opinions. This is especially important here, where the briefing before the Tenth Circuit amply pointed out the reasons why Kansas courts do not follow the "strict duty of care" rule. As discussed *infra,* this improper deference which the Tenth Circuit gave to its prior *Erie*-predictive opinions has been recognized as inappropriately sacrificing *Erie*'s commitment to federalism on the altar of *stare decisis.*

II. THE PROMULGATION AND ENTRENCHMENT OF THE SPURIOUS STANDARD IN FEDERAL COURT OPINIONS VIOLATES THE COMMANDS AND PRINCIPLES OF *ERIE.*

The Tenth Circuit's refusal to correct its prior mistakes has created a profound *Erie* problem by injecting an erroneous state law standard into federal caselaw. Kansas strict liability law, as accurately captured by the Tenth Circuit in the *Hardin* decision and reaffirmed in subsequent Kansas decisions, imposes upon manufacturers a

duty to keep defective and unreasonably dangerous products out of the stream of commerce. The Tenth Circuit in *Prince* then misinterpreted the duty imposed by Kansas' strict liability law to be one of strictly guarding even negligent product users against injury from non-defective products. This invented duty does nothing less than arbitrarily, capriciously and erroneously impose absolute liability on a manufacturer for any injury suffered by a user of a product, even if the product is not defective or unreasonably dangerous. The *dicta* of *Prince*'s footnote nine, *supra*, creates absolute liability for manufacturers such as A.B. Chance, thus making them casualty insurers for any injury associated with their products, in plain violation of Kansas law. *See Jenkins v. Amchem Products, Inc.*, 886 P.2d 869, 887 (Kan. 1994) (absent proof of defect, strict liability would become absolute liability); *Timsah v. General Motors Corp.*, 591 P.2d 154, 162 (Kan. 1979) ("Manufacturers and sellers are not insurers of the safety of persons in the use of the product."). It creates two distinct and embedded bodies of ostensible Kansas law: actual Kansas law, employed by Kansas courts; and the Tenth Circuit's version of Kansas law, employed by federal courts when sitting in diversity. Also, the injection of this new "strict duty of care" into cases which already involve strict liability standards was certain to confuse juries, as it clearly did in the case at bar.

A. The Failure to Correct the Tenth Circuit's Prior Error in Interpreting Kansas Law Will Encourage and Reward Forum Shopping.

In *Hanna v. Plumer*, 380 U.S. 460 (1965), this Court described the twin aims of the *Erie* rule as "discouragement of forum shopping and avoidance of inequitable administration of the laws." *Id.* at 468. The Tenth Circuit's invention and self-perpetuated misinterpretation of Kansas' strict liability law directly compromises these two goals.

There are now two distinct bodies of Kansas product liability law. Actual Kansas law requires plaintiffs to prove defendant's negligence or a product defect. *Jenkins*, 886 P.2d at 887-89. The spurious Tenth Circuit version now followed by those federal courts which are required to apply it permits recovery whenever there is injury, regardless of whether there is proof of the existence of a product defect or the negligent misuse of the user. *Prince*, 720 F.2d at 1171 and n.9; App. at 7a. The Tenth Circuit's misguided interpretation of Kansas law is a pro-plaintiff rule of absolute liability, which any plaintiff would naturally find irresistible.

Given these two distinct bodies of Kansas law, no economically rational plaintiff who meets diversity requirements will ever file suit in Kansas state court when there is a reward for forum shopping the federal court down the block for its attractive (albeit erroneous) standard of absolute liability. *See Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945) ("The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit . . . in a federal court instead of in a State court a block away should not lead to a substantially different result.").

B. Failure to Correct the Tenth Circuit's Erroneous Interpretation of Kansas Law Will Result in Inequitable Administration of the Laws.

The erroneous Tenth Circuit "strict duty of care" rule also promotes inequitable administration of laws by producing substantially different results in state and federal courts. The inequity is revealed by how it operated in the present case to deprive Petitioner A.B. Chance of a fair trial. The jury had before it ample evidence that Petitioner was not negligent, and did not put a defective and unreasonably dangerous Polecat into the stream of commerce. The jury could well have concluded that Petitioner

manufactured a safe and non-defective machine, did everything a reasonable manufacturer should do to insure that it was used properly, and that all of Plaintiff's injuries were due to the City's misuse of the Polecat. If so, then under the District Court's instructions on negligence and strict liability, the jury would have returned a verdict finding the City 100% liable for Plaintiff's injuries.

Instead, the jury was directed to consider the instruction which erroneously saddled A.B. Chance with a "strict duty of care . . . to guard against injury to ordinary and even negligent consumers." This erroneous and prejudicial instruction told the jury that even if Plaintiffs' injuries were due entirely to the negligence of the City's employees, A.B. Chance was still strictly liable for guarding against such injuries. The result could have been, and probably was, that the jury found neither negligence nor strict liability on the part of A.B. Chance, but nevertheless imposed 50% of the liability on A.B. Chance in order to comply with the erroneous instruction.

Kansas law would never tolerate such a result, because it requires that strict liability be based upon a proven defect in the particular product, and that negligence liability be based on a breach of the duty of reasonable care. *See Jenkins, supra*; PIK3d §§ 128.01, 128.17. The Tenth Circuit thus promotes and perpetuates "confusion and injustices arising from inconsistent federal and state interpretations of state law." *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941). The confusion and injustice at issue is not confined to this case—it has been ongoing since the 1980's, and, given the powerful influence which federal circuit court opinions can exert in shaping state law,[6] it will continue to expand unless

---

[6] *See, e.g., Matter of McLinn*, 739 F.2d 1395, 1401-02 (9th Cir. 1984) (tracking development of California's law of strict liability through influential federal opinions).

this Court intervenes to correct the Tenth Circuit's improper approach to honoring and discharging its *Erie* duties.

III. THE TENTH CIRCUIT'S DECISION DEMONSTRATES THE CONFLICTING AND IMPROPER STANDARDS APPLIED BY THE CIRCUIT COURTS OF APPEAL TO THE APPLICATION OF *STARE DECISIS* TO *ERIE*-PREDICTIVE PRECEDENT IN VIOLATION OF THIS COURT'S DIRECTIVES IN *SALVE REGINA COLLEGE.*

If all that the Tenth Circuit had done in the instant case was to perpetuate an erroneous interpretation of state law, then Petitioner acknowledges that this case most likely would not merit certiorari review. *See Bishop v. Wood,* 426 U.S. 341, 346-47 & n.10 (1976) (signaling this Court's hesitancy to use certiorari review to correct federal court misinterpretations of state law). The Tenth Circuit's opinion in this case is much more than merely wrong, however. It illustrates the conflicting divergence among the circuit courts of appeal in their approaches to the application of *stare decisis* to *Erie*-predictive precedents, and also violates fundamental principles of federalism in its cavalier invention and entrenchment of spurious state law. Petitioner addresses these two issues seriatim.

This case exemplifies the frequently occurring situation where a federal trial or appellate court sitting in diversity is called upon to determine state law in an area arguably not addressed or settled by the state's highest court, but where a federal court has issued one or more prior opinions predicting what law the state's highest court would apply, and thereafter a state intermediate appellate court decision is issued or other authority emerges which suggests that the federal courts predicted state law incorrectly. This scenario presents the federal court with an outcome-determinative problem: whether to follow its own predictive precedent under principles of *stare decisis,* or

whether to re-examine prior precedent in light of state authority which may not be so controlling as a state high court decision directly on point, but provides a substantial basis for concluding that the prior predictive precedent was wrong. As discussed below, the approaches among the circuit courts of appeal to this problem vary widely, with the majority of circuits shortchanging their *Erie* obligation to accurately predict state law by giving far too much deference to their own predictive precedent.

A. The Tenth Circuit Improperly Applied *Stare Decisis* to Affirm Its Erroneous *Erie*-predictive Precedent in the Face of Contrary State Authority.

As discussed above, the Tenth Circuit's foray down the path of error began in *Prince v. Leesona Corp.*, 720 F.2d 1166 (10th Cir. 1983), where the Tenth Circuit invented the erroneous "strict duty of care" rule in a footnote of *dicta*. The Panel in *Prince* even noted in the same breath that Kansas strict liability law was in a "state of transition." *Prince*, 720 F.2d at 1171. This acknowledgment should have alerted subsequent federal diversity courts to be wary of placing any reliance on this *dicta* of *Prince*, and to return to the appropriate sources of Kansas law for subsequent determinations and interpretations of Kansas' law of strict liability.

Five years later, in *Wheeler v. John Deere Co.*, 862 F.2d 1404 (10th Cir. 1988), the Tenth Circuit was afforded an opportunity to confirm whether the *dicta* in *Prince* was an accurate description of Kansas' evolving law of strict liability. A careful analysis of Kansas law would have revealed that the "strict duty of care" language of *Prince* had not been cited or adopted by any Kansas court, but that the prior contrary federal interpretation of Kansas law in *Hardin* had been cited approvingly by Kansas courts.[7] Instead of undertaking such a review

---

[7] *See Mills by Mills v. Smith*, 673 P.2d 117, 120-21 (Kan. App. 1983).

of state law, as commanded by *Erie* and its progeny, including especially *Salve Regina College v. Russell*, 499 U.S. 225 (1991), the *Wheeler* Panel simply noted the possible inaccuracy of the *Prince dicta*, but held nonetheless that the "strict duty of care" *dicta* from *Prince* appeared to be a close enough approximation of Kansas law to serve until express correction arrived from the Kansas courts. *Wheeler*, 862 F.2d at 1412-13 & n.5.

Finally in the instant case, the Tenth Circuit completely abandoned any pretense of discharging its obligation under *Erie* to determine state law by reference to appropriate state law authorities. Instead, the Tenth Circuit disposed of its *Erie* analysis by summarily citing its prior decisions in *Wheeler* and *Prince*, and stating that general principles of *stare decisis* prevented the Court from departing from these erroneous precedents. *See* App. A at 7a. The Tenth Circuit thus chose to defer entirely to its own seventeen-year-old *dicta* under general principles of *stare decisis* rather than re-examine Kansas authority on the issue. *See, e.g., McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657, 663 (3rd Cir. 1980) (discussing the numerous sources of dynamic authority which federal diversity courts may consider in predicting how a state supreme court would rule on an unsettled issue of state law).

As discussed below, this practice of federal diversity courts deferring to their own prior predictive precedent instead of examining state law anew shortchanges *Erie*'s overarching goal of doctrinal coherence by creating divergence between state and federal law. Also, the circuit courts of appeal vary considerably in their approaches to dealing with this tension between federalism and *stare decisis*. Both of these problems—the improper application of *stare decisis* and the split among the circuits as to its application—call for this Court to impose a uniform

practice which accords proper respect to the states' authority to define their own common law.

B. The Circuits Are Divided and Generally Afford Too Much Deference to Their Prior Predictive Opinions, in Violation of This Court's Guidance in *Salve Regina College.*

In *Salve Regina College v. Russell,* 499 U.S. 225 (1991), this Court granted certiorari to establish a uniform standard of review by the circuit courts of appeal for a district court's ascertainment of state law under *Erie.* 499 U.S. at 231. Some circuit courts of appeal reviewed district court state law determinations using the same *de novo* standard applicable to other legal determinations by the district court. Others used various deferential standards, under the theory that district court judges had greater familiarity with the law of the states in which they sat, having frequently been experienced practitioners and state court judges. *Id.*

This Court resolved the circuit split by holding that the *de novo* standard of review was appropriate. In addition to the ample structural reasons why *de novo* review is proper,[8] this Court also discussed how *de novo* review is compelled by the principles of federalism at the core of *Erie*:

> [A]ppellate deference to the district court's determination of state law is inconsistent with the principles underlying this Court's decision in *Erie.* The twin aims of the *Erie* doctrine—"discouragement of forum-shopping and avoidance of inequitable administration of the laws,"—are components of the goal of doctrinal coherence advanced by independent appellate review. As respondent has conceded, deferen-

[8] *E.g.,* a panel of unhurried appellate judges can be expected to decide legal issues with the benefit of thorough refined briefing better than a single trial judge burdened by the demands of a fact-intensive and fast-paced trial. *See* 499 U.S. at 231-33.

> tial appellate review invites divergent development of state law among the federal trial courts even within a single State. Moreover, by denying a litigant access to meaningful review of state-law claims, appellate courts that refer to the district courts' state-law determinations create a dual system of enforcement of state-created rights in which the substantive rule applied to a dispute may depend on the choice of forum. Neither of these results, unavoidable in the absence of independent appellate review, can be reconciled with the commands of *Erie*.

499 U.S. at 234. The present question—the proper determination and the degree of deference which federal courts should pay to their prior predictive precedent—is the logical corollary to the rule announced in *Salve Regina College*.

When sitting in diversity and predicting state law, federal courts do not make law which states (or even other federal courts) are bound to follow; hence these predictive precedents have no true and binding precedential value. *See Moore v. Sims*, 442 U.S. 415, 428 (1979) (federal prediction of state law "is not binding on state courts and may be discredited at any time."). While the values of *stare decisis* as between federal decisions are thus minimal, the fundamental value of doctrinal coherence with state law is central. *See Salve Regina College*, 429 U.S. at 234. Just as *Erie* requires circuit courts of appeal to apply their own considerable judicial skills to the issue of determining state law, rather than deferring to the determination of a single trial judge, so too do *Erie* and *Salve Regina College* require that federal courts not allow principles of *stare decisis* to improperly control their determinations of state law. Doctrinal coherence is advanced by a ready willingness to reexamine state law, given some evidence that prior federal predictions are no longer accurate. Misplaced and thoughtless adherence

and unyielding allegiance to *stare decisis* in the face of contrary or unclarified state authority promotes divergence between state law and its interpretation by federal courts. Articulation by this Court of uniform standards for the circuit courts of appeal on this issue is the only way to fully assure the implementation of the principles of federalism set forth in *Salve Regina College*.

The situations in which the tension between commitment to *stare decisis* or doctrinal coherence arises are limited, but arise regularly and have profound consequences for diversity litigants. No *stare decisis* concerns arise where a state's supreme court has recently settled an issue of state law, in which case federal courts have clear guidance. Nor do any problems arise where there is no intervening state authority suggesting that a prior federal predictive precedent is incorrect, in which case federal courts have no reason to deviate from their prior predictive precedent. The critical tension arises both where intervening authority suggests but does not compel the conclusion that a federal predictive precedent is inaccurate and, as here, where the circuit court of appeals has arrogated to itself invention of a new rule of state law entirely unknown to that state. In both circumstances, the federal courts are confronted with a choice between following their own prior precedent or undertaking a new *Erie* analysis which might lead to a different prediction of state law.[9] While slavishly following prior predictive precedent is the easier path, this Court's analysis of *Erie* values in *Salve Regina College* directs that federal courts must willingly undertake a re-examination of their precedent which any intervening state authority, or the circuit's own opinions, calls into doubt.

---

[9] *See* Jed I. Bergman, *Putting Precedent in Its Place: Stare Decisis and Federal Predictions of State Law*, 96 Columbia Law Review 969, 990-91 (1996).

Currently, the circuit courts of appeal that have addressed the issue take a variety of approaches to the degree of deference they give to their prior *Erie*-predictive precedent:

- The Second Circuit applies a standard of reviewing its prior predictive precedent when intervening authority "tends to cast doubt" on the federal precedent. *See Woodling v. Garrett Corp.*, 813 F.2d 543, 557 (2nd Cir. 1987) ("A ruling of one panel of this Circuit on an issue of state law normally will not be reconsidered by another panel absent a subsequent decision of a state court *or of this Circuit* tending to cast doubt on that ruling.") (emphasis added).

- The Third Circuit applies a much more rigid standard of requiring "persuasive evidence" that its prior predictive precedent is no longer accurate. *See Smith v. Calgon Carbon Corp.*, 917 F.2d 1338, 1343 (3rd Cir. 1990) ("However, in the absence of a clear statement by the Pennsylvania Supreme Court to the contrary or other persuasive evidence of a change in the Pennsylvania law, we are bound by the holdings of previous panels of this court. Third Circuit Internal Operating Procedure 9.1.").

- The Fifth Circuit makes no distinction between the *stare decisis* value of *Erie*-predictive precedent and other precedent based on federal law, and thus adheres to a wholly inflexible and improper rule of following its own predictive precedent until expressly overruled by state authority:

> We are, of course, a strict stare decisis court. One aspect of that doctrine to which we adhere without exception is the rule that one panel of this court cannot disregard, much less overrule, the decision of a prior panel. *Adherence to this rule is no less immutable when the matter de-*

> *termined by the prior panel is the interpretation of state law: Such interpretations are no less binding on subsequent panels than are prior interpretations of federal law.* . . . We conclude then, that when our *Erie* analysis of controlling state law is conducted for the purpose of deciding whether to follow or depart from prior precedent of this circuit, and neither a clearly contrary subsequent holding of the highest court of the state nor a subsequent statutory authority, squarely on point, is available for guidance, we should not disregard our own prior precedent on the basis of subsequent intermediate state appellate court precedent unless such precedent comprises unanimous or near-unanimous holdings from several—preferably a majority—of the intermediate appellate courts of the state in question.

F.D.I.C. v. Abraham, 137 F.3d 264, 268-69 (5th Cir. 1998) (emphasis added).[10]

---

[10] One particularly infamous miscarriage of justice resulting from the Fifth Circuit's improper deference to its own *Erie*-predictive precedent is *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743 (5th Cir. 1995). Like the present case, *Batts* involved the *Erie* question of a particular legal standard in a products liability case. Prior Fifth Circuit precedent had made a prediction as to how the Mississippi Supreme Court would rule on the issue; the plaintiff pointed to other Mississippi authority which suggested that the prior prediction was wrong. The Fifth Circuit, however, applied its rigid standard that prior predictive precedents of the Circuit must be followed unless subsequent decisions establish that they are "clearly wrong." 66 F.3d at 747. The district court therefore applied the prior predictive precedent, rather than the contrary state authority, and entered judgment for the defendant, which the Fifth Circuit affirmed. *Batts v. Tow-Motor Forklift Co.*, 978 F.2d 1386 (5th Cir. 1992).

Later, the Mississippi Supreme Court confirmed the plaintiff's analysis concerning Mississippi's products liability law, noting that the Fifth Circuit interpretation applied in *Batts* was wrong. *See*

- The Sixth Circuit appears to employ a flexible standard which re-examines its prior *Erie*-predictive precedent upon "an indication" from the state courts that the precedent is outdated. *See Blaine Const. Corp. v. Ins. Co. of North America,* 171 F.3d 343, 350 (6th Cir.), *reh'g denied* (1999) ("Finally, [Cross-appellant] asks us to reconsider [a prior circuit court decision]. This panel cannot do that, however, absent an indication by the Tennessee courts that they would have decided [the case] differently.").

- The Ninth Circuit hews closely to its own predictive precedent at the cost of doctrinal coherence with state law, requiring "intervening controlling authority" to cause a re-examination of its prior predictive precedent. *See F.D.I.C. v. McSweeney*, 976 F.2d 532, 535 (9th Cir. 1992) ("As a three-judge panel, we are bound by our prior decisions interpreting state as well as federal law in the absence of intervening controlling authority.").

- While the Tenth Circuit has not considered the issue in any detail, its opinion in the instant case summarily deferring to its own prior precedent in the face of Petitioner's presentation of contrary authority and request for certification of the issue to the Kansas Supreme Court establishes that it thoughtlessly and carelessly elevates its baseless concerns for *stare decisis* over the relevant goal of doctrinal coherence. Even without any analysis

---

Sperry-New Holland v. Prestage, 617 So.2d 248, 254-55 (Miss. 1993). The plaintiff petitioned for relief under F.R.C.P. 60(b)(6), which allows judgment to be set aside for "any reason justifying relief." The district court set aside the judgment, only to be reversed by the Fifth Circuit, which held that its own erroneous prediction of state law did not justify such extraordinary relief. *Batts* thus represents the ultimate Kafkaesque application of a circiut court of appeal's improper devotion to *stare decisis* over *Erie*'s federalism. *See* Bergman, *supra* fn. 9 at 986-88.

> concerning *Erie*-predictive precedent, however, the Tenth Circuit's own general *stare decisis* precedent required it to re-examine the "strict duty of care" rule in this case. *See Hill v. Bank of Colorado*, 648 F.2d 1282, 1286 (10th Cir. 1981) ("The rule of *stare decisis* does not require any court to follow a judicial rule which is erroneous."); *see also Green v. United States*, 356 U.S. 165, 195 (1958) ("As others have demonstrated, the principle commonly referred to as *stare decisis* has never been thought to extend so far as to prevent the courts from correcting their *own* errors.") (emphasis added).

In sum, the circuits follow a wide variety of internal rules for re-examining their own *Erie*-predictive precedent. At one end of the spectrum is the Second Circuit, which appears to recognize the absence of any real *stare decisis* value in its own predictive precedents and therefore re-examines state law whenever subsequent authority or its own opinions "tend to cast doubt" on its precedents, consistent with *Salve Regina College*. At the other end are the Fifth and Ninth Circuits, which will not re-examine their prior predictive precedents until those precedents are expressly overruled or shown to be "clearly wrong." The Fifth Circuit in particular shows a profound misunderstanding of the *Erie* values emphasized by this Court's decision in *Salve Regina College*, and repeatedly sacrifices the ultimate goal of doctrinal coherence in favor of a baseless and misplaced commitment to *stare decisis*—despite the miscarriages of justice that it knows can result. *See Batts*, fn. 10, *supra*.[11] Yet because the Fifth Circuit

---

[11] This case presents a serious possibility of another *Batts*-like scenario: if and when the Kansas courts do choose to clarify that the federal "strict duty of care" rule is not an accurate statement of Kansas law, it will most likely be too late for Petitioner to re-open or otherwise recover the $1.7 million judgment it was erroneously forced to pay out in this case.

has far more published opinions on this issue than any other circuit, it tends to be cited by lower federal courts in circuits which have not addressed this issue. *See, e.g., In re Jones,* 18 B.R. 161, 164 (Bankr. W.D. Ok. 1982) (following Fifth Circuit approach of refusing to re-examine state law absent intervening authority showing prior federal precedent to be "clearly wrong").

Like the issue of the proper standard of review addressed in *Salve Regina College,* the application of *stare decisis* in *Erie* cases is not controlled by federal statutes or rules, and is therefore the sort of *Erie* issue which can be definitively settled only by a decision from this Court. The issue has percolated in the circuit courts of appeal for some time now. Despite the guidance provided by *Salve Regina College* over eight years ago, the circuit courts of appeal have produced differing standards and analyses as to the lack of precedential value in *Erie*-predictive opinions, most of which shortchange the importance of maintaining doctrinal coherence with state law. The issue is thus ripe for consideration and disposition by this Court.

This Court should grant certiorari to establish a uniform practice among the circuits which gives proper weight to *Erie*'s federalism principles, as developed by *Salve Regina College.* Specifically, this Court should remind lower federal courts that their *Erie*-predictive precedents do not have any real *stare decisis* value, but should be re-examined whenever a party presents evidence that a state's highest court may well reach a different result, *see* Jed I. Bergman, *Putting Precedent in Its Place: Stare Decisis and Federal Predictions of State Law,* 96 Columbia Law Rev. 969, 1007-12 (1996), or where their own opinions invent a rule of state law unknown to that state and then re-affirm their creation. *See Woodling v. Garrett Corp., supra,* 813 F.2d at 557. Federal courts might also

be directed to re-examine their *Erie*-predictive precedents *sua sponte*, just as state courts are properly expected to keep abreast of the latest developments in federal law from this Court and the lower federal courts.

Such a rule would set and clarify the appropriate balance between the lower federal courts' reflexive respect for *stare decisis* and the more important but scarcely appreciated doctrinal coherence considerations discussed in *Salve Regina College*. It would prevent federal courts from inventing erroneous constructs of state law and allowing these constructs to work their way into federal jurisprudence without regard to their divergence with actual state law. Had such a rule been applied in the present case, both the district court and the Tenth Circuit would have been required to re-examine their continued adherence to the "strict duty of care" rule invented in *Prince* and embedded in *Wheeler*, and would have realized that the rule simply does not comport with Kansas law.

IV. THE TENTH CIRCUIT'S CAVALIER STANCE THAT IT MAY CREATE STATE LAW, SUBJECT ONLY TO EXPRESS CORRECTION OF THE KANSAS COURTS, VIOLATES FUNDAMENTAL PRINCIPLES OF FEDERALISM.

As discussed, the Tenth Circuit's opinion in this case is wrong in its result, in that it continues to employ a spurious construct that the Tenth Circuit invented and embedded in Kansas' law of products liability. The opinion is also wrong in its reasoning, in that it gives improper deference to prior federal *Erie*-predictive precedent—an area which merits clarification and resolution by this Court. Finally, the Tenth Circuit's opinion also demonstrates a complete disregard for the sovereign authority of Kansas courts to define their own common law of strict liability, in violation of fundamental principles of federalism which this Court has thoughtfully revived in its recent jurisprudence.

In his concurrence to *Hanna v. Plumer*, Justice Harlan discussed at length how he believed the rule of *Erie* to be about not just "forum shopping and avoidance of inequitable administration of the laws," but primarily about federalism: "I have always regarded [*Erie*] as one of the modern cornerstones of our federalism, expressing policies that profoundly touch the federal systems." 380 U.S. at 474. This Court has more recently acknowledged that Justice Harlan's federalism concerns do indeed lie at the heart of the *Erie* doctrine. *See Salve Regina College*, 499 U.S. at 239 (*de novo* review required by *Erie*'s "principles of a cooperative judicial federalism"); *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring) (*Erie* doctrine is one of the Court's vehicles for maintaining proper federal/state balance of power). *Accord A.I. Trade Finance, Inc. v. Petra International Banking Corp.*, 62 F.3d 1454, 1464 (D.C.Cir. 1995) ("The *Erie* doctrine is not simply a rule of convenience for diversity cases but an acknowledgment of the powers of the several states and of the limited nature of the federal government."); *Moe v. Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917, 932-33 (10th Cir. 1984) (*Erie* doctrine is rooted in Tenth Amendment's limitations of federal power).

The essence of federalism, as developed by this Court in its recent decisions, is that federal courts must respect the spheres of state sovereignty where states, and only states, have authority to say what their law is, or should be. *E.g., Alden v. Maine*, —— S.Ct. ——, 1999 WL 412617 (June 23, 1999) (re-affirming basic principles of state sovereign immunity); *Printz v. United States*, 521 U.S. 98 (1997) (background check provisions of Brady Handgun Violence Prevention Act unconstitutionally co-opted state officers to execute federal laws); *United States v. Lopez, supra* (Gun-Free School Zones Act exceeded Congress' commerce clause authority). *Compare* Gregory

Gelfand & Howard B. Abrams, *Putting Erie on The Right Track*, 49 U. Pitt. L. Rev. 937, 949-52 (1988) (discussing how the previously unchecked expansion of federal power had reduced principles of federalism articulated in *Erie* to a paternalistic practice whereby federal courts permitted states to exercise authority in areas which the federal government deemed unimportant).

The values of federalism are directly implicated when a federal court undertakes its duty to determine state law under the rule of *Erie*. As this Court has noted, the duty of federal courts to accurately determine state law is a profound and solemn responsibility:

> [*Erie*] did not free the federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern.

Meredith v. City of Winter Haven, 320 U.S. 228, 237 (1943).

In the instant case, the Tenth Circuit has abrogated its solemn responsibility to accurately determine state law in a manner which is not only wrong, but presents a particular affront to the fundamental principles of federalism discussed above. Here, the Tenth Circuit abandoned its duty to maintain doctrinal coherence with state law. *See Salve Regina College, supra.* Instead, the Tenth Circuit simply invented a rule of state law, acknowledged that it might well be inaccurate, but cavalierly stated that it would continue to hew to this rule until the Kansas courts step in to correct it. *Wheeler*, 862 F.2d at 1412-13.

The directives of *Erie* and its progeny, such as *Meredith* and *Salve Regina College, supra*, do not permit federal courts to be so arbitrary, capricious and erroneous in their approach to determining state law. The Tenth Cir-

cuit's approach to diversity jurisdiction fails to recognize that Kansas courts almost certainly will not step in to clarify the confusion which the Tenth Circuit created with its erroneous decision in *Prince*—that is not the job of Kansas courts, which do not encounter and have no reason to deal with the rule announced in that case. *See* Craig A. Hoover, *Deference to Federal Circuit Court Interpretations of Unsettled State Law: Factor Etc., Inc. v. Pro Arts, Inc.*, 1982 Duke L. J. 704, 728-29 ("Ordinarily, however, state courts cannot be expected to rectify ill-founded interpretations of state law by federal courts.").

CONCLUSION

This case presents much more than a federal misinterpretation of state law. Rather, this case exemplifies the disarray in the circuits in their approaches to *Erie*-predictive precedent—the circuits' divergent standards mostly sacrifice doctrinal consistency for a reflexive and improper solicitude for *stare decisis*. The instant decision is worse than most, in that it does not merely reiterate an erroneous federal prediction of state law through misplaced adherence to *stare decisis*, but continues to entrench a spurious and invented construct which the Tenth Circuit has virtually acknowledged may be wrong, but has nonetheless bootstrapped into its caselaw through a combination of *stare decisis* and stated disdain for Kansas' authority to define its own common law of products liability. Proper respect for the principles of federalism expounded in *Erie* and refined in *Salve Regina College* require that such an approach not be countenanced by this Court, but be righted by this Court.

For the above reasons, the petition for writ of certiorari should be granted and a writ of certiorari should be issued.

Respectfully submitted,

JOHN M. KOBAYASHI *
SUSAN G. PRAY
MICHELE R. LAMONTAGNE
BENNETT L. COHEN
THE KOBAYASHI LAW FIRM, P.C.
1633 Fillmore Street
Denver, CO 80206
(303) 399-2100
Counsel for Petitioner

* Counsel of Record

July 29, 1999

APPENDICES

APPENDICES

APPENDIX A

[Filed Apr. 7, 1999]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 97-3377
(D.C. No. 94-CV-1423)
(D. Kan.)

MAE ENFIELD, conservator and natural mother of
JERRY ALLEN ENFIELD,
Plaintiff-Appellee,

vs.

A.B. CHANCE COMPANY and
EMERSON ELECTRIC COMPANY,
Defendants-Appellants.

CITY OF GOODLAND, KANSAS,
Intervenor.

ORDER AND JUDGMENT *

Before KELLY, MCKAY, and LUCERO, Circuit Judges.

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Plaintiff-appellee Jerry Allen Enfield was injured in 1992 by a utility pole that broke and fell on him while it was being removed from the ground. The injury occurred when the boom of a Pitman Polecat digger-derrick ("Polecat"), manufactured by Defendant-appellant A.B. Chance, collapsed while removing the pole from the ground. The boom was fastened to the mainframe of the Polecat with twenty-four bolts. These bolts broke, causing the boom to separate from the mainframe. The weight of the collapsing boom snapped the pole, causing it to fall on Mr. Enfield. Mr. Enfield brought this personal injury products liabiilty diversity action based on Kansas law in September of 1994. A jury found A.B. Chance fifty-percent responsible for Mr. Enfield's injuries, and final judgment was entered against it in the amount of $1,733,002 with interest. A.B. Chance appeals from the judgment and claims that the district court erred by: (1) admitting proof of other accidents; (2) admitting evidence of subsequent use of the Polecat; and (3) improperly instructing the jury. The parties are familiar with the facts, and we discuss them further only as necessary to resolve the issues on appeal. Our jurisdiction arises under 28 U.S.C. § 1291, and we affirm.

A. Evidentiary Challenges

A.B. Chance alleges that the district court committed the following errors in admitting proof of other accidents: (1) failing to require evidence that the other accidents were substantially similar before admitting them; (2) admitting evidence of other accidents through Defendant's expert witness contrary to the requirements of Fed. R. Evid. 703; and (3) admitting a Product Liability Task Force Report without finding substantial similarity of the accidents discussed in the report and without properly conducting a Fed. R. Evid. 401 and 403 analysis. In

addition, A.B. Chance contends that the district court committed the following errors in refusing to admit evidence regarding the Intervenor City of Goodland's ("the City") subsequent use of a pole puller: (1) misapplying Fed. R. Evid. 407 to the admission of the evidence; (2) misapplying Rule 407 to rebut the City's claim that using a pole puller was not feasible; (3) misapplying Rule 407 because the purpose of the rule is to protect potential defendants, not third parties like the City. We do not overturn a district court's decision to admit or exclude evidence absent an abuse of discretion, *see McCue v. Kansas*, 1999 WL 5064, at *3 (10th Cir. 1999), and then, only if a substantial right of a party is affected. *See* Fed. R. Evid. 103; *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 776 (10th Cir. 1999); *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1518 (10th Cir. 1995).

1. Proof of Other Accidents

Evidence of other accidents in a product liability case may be admitted to show notice or defect, provided that the party offering the evidence demonstrates that "the circumstances surrounding the other accidents were substantially similar to the accident involved in the present case." *Wheeler v. John Deere Co.*, 862 F.2d 1404, 1407 (10th Cir. 1988). Whether accidents are substantially similar depends, in part, upon the theory of the case. *See id.; Ponder v. Warren Tool Corp.*, 834 F.2d 1553, 1560 (10th Cir. 1987). However, the accidents need only be substantially similar, not exactly the same; the differences between the accidents not affecting their substantial similarity go to the weight of the evidence, not to its admissibility. *See Wheeler*, 862 F.2d at 1408.

Here, the district court found that the six accidents were relevant and substantially similar to the accident at

issue after receiving briefs and hearing arguments with respect to the admission of this evidence. After reviewing the record, we find that the district court did not abuse its discretion in its ruling. All six accidents occurred prior to Mr. Enfield's accident, and all involved the same component parts. *See* VI R. at 1884. Although the accidents did not occur in exactly the same manner as Mr. Enfield's accident, precise similarity is not required.

A.B. Chance relies on this court's holding in *Julander v. Ford Motor Co.*, 488 F.2d 839 (10th Cir. 1973), to support its argument that the court cannot admit evidence of the other accidents when the admission is based solely on similar component parts. However, the court in *Julander* excluded the evidence because there was no proof that the accidents occurred prior to the accident at issue and, thus, evidence of the accidents was not justified to prove notice. *See id.* at 846. While the *Julander* court could not determine "whether the precise problem encountered by the seven complainants was the same as that claimed to have been encountered by [the plaintiff]," the court's holding did not rely on the lack of similarity of the problems. *Id.*

In this case, all six accidents occurred prior to Mr. Enfield's accident; three occurred prior to the 1981 manufacture of the Polecat at issue, and three occurred after. *See* VI R. at 1884. A.B. Chance contends that evidence of the three accidents that occurred after the 1981 manufacture date should not have been admitted because Mr. Enfield did not allege that A.B. Chance had any post-manufacture obligations. Plaintiff presented evidence of the six similar accidents in his case-in-chief. At the end of Plaintiff's case in chief, the district court dismissed Plaintiff's warning and warranty claims. *See* II R. at 631-32. At this point, A.B. Chance failed to request a limit-

ing instruction regarding the three accidents that occurred after 1981. These dismissed claims did involve some post-manufacture, pre-accident obligations on A.B. Chance's part. Therefore, the district court did not abuse its discretion in admitting both the pre- and post-manufacture accidents.

A.B. Chance also contends that the district court erred in admitting evidence of these other accidents through Mr. Enfield's expert witness, contrary to the requirements of Fed. R. Evid. 703. This contention is without merit. The court had already ruled the evidence of the prior accidents admissible as relevant evidence. Thus, Rule 703 does not apply because the expert's opinion was based on admissible evidence, not "otherwise *inadmissible hearsay*." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993) (emphasis added). Therefore, admission of the evidence was not improper, and the district court did not abuse its discretion in allowing the expert to rely on the accidents already found to be substantially similar to the accident at issue.

The trial court admitted a redacted version of A.B. Chance's internal Product Liability Task Force Report, finding that it was relevant to show notice of prior accidents. *See* II R. at 383-86. A.B. Chance argues that the trial court erred in admitting the Report without finding substantial similarity of the accidents and without properly weighing the evidence under Fed. R. Evid. 401 and 403. We find that the district court did not abuse its discretion in admitting the Report. First, the court reviewed the entire Report and only permitted Plaintiff to use the portions it determined to be relevant. *See* II. R. at 383-86; *see àlso* Fed. R. Evid. 401. Second, the record reflects only a general relevance objection and shows that the district court carefully considered Rule 403 factors

in determining which portions of the Report to admit. *See* II R. at 383-86. The court's determination that the Report had probative value was clearly not an abuse of discretion. Likewise, the trial court carefully considered the question of similarity and concluded that, in fact, the accidents were of a similar nature. We fail to see an abuse of discretion as argued.

2. Evidence of the City's Subsequent Use of a Pole Puller

A.B. Chance argues that the district court erred by refusing to admit evidence that, after Mr. Enfield's accident, the City began using a pole puller in compliance with A.B. Chance's operating manuals. A.B. Chance argues that the district court improperly excluded the evidence based on Fed. R. Evid. 407, instead of Kansas law. Because A.B. Chance failed to raise the application of Kansas law to the district court, we will not consider the issue for the first time on appeal. *See Tele-Communications, Inc. v. Commissioner*, 12 F.3d 1005, 1007 (10th Cir. 1993). A.B. Chance also contends that, given Rule 407, the court abused its discretion in refusing to admit the evidence. After carefully reviewing all of A.B. Chance's arguments and the record, we find that the district court did not abuse its discretion in declining to admit evidence on the City's subsequent use of a pole puller.

B. Jury Instructions

A.B. Chance alleges that the district court committed the following errors in instructing the jury: (1) instructing the jury that a manufacturer has a "strict duty of care" which improperly states Kansas law and misled the jury; (2) instructing the jury that evidence of a later-issued standard was irrelevant; (3) declining to include A.B. Chance's proposed jury instruction on substantial change

or alteration to the polecat by the City. In a diversity case, the determination of the substance of a jury instruction is a matter of state law, but the grant or denial of an instruction is a procedural matter controlled by federal law. *See Dillard & Sons Constr., Inc. v. Burnup & Sims Comtec, Inc.*, 51 F.3d 910, 915 (10th Cir. 1995). We review de novo whether the district court's instructions, considered as a whole, properly stated the applicable law and focused the jury on the relevant inquiry. *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 552 (10th Cir. 1999). "The instructions need not be entirely free from fault, but they may not serve to mislead the jury in any way." *Dillard & Sons Constr., Inc.*, 51 F.3d at 915.

1. Strict Duty of Care Instruction

A.B. Chance contends that the district court erred in instructing the jury that a manufacturer has a "strict duty of care" because the instruction improperly states Kansas law. However, this court has previously found that Kansas strict liability law includes such a duty and has upheld similar jury instructions. *See Wheeler*, 862 F.2d at 1412; *Prince v. Leesona Corp.*, 720 F.2d 1166, 1171 n.9 (10th Cir. 1983); *Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449, 455 (10th Cir. 1982). Under the principles of *stare decisis*, we must abide by these holdings. *See United States v. Brooks*, 161 F.3d 1240, 1247 (10th Cir. 1998). In light of this court's previous holdings and after analyzing the instruction as a whole, we find that this instruction adequately reflects Kansas law.

2. Later-Issued Standard Instruction

A.B. Chance argues that the district court erred in including the following instruction:

> Proof of compliance with a standard that was in effect at the time of manufacture is not a defense to

> a charge of negligence unless such practice is consistent with standards or ordinary care. For example, a manufacturer's compliance with a standard that was in effect at the time of manufacture is not dispositive under Kansas law if it is shown that a reasonable manufacturer would have done more.
>
> A standard that was issued and became effective after the date of manufacture is not relevant and should not be considered by you on the question of whether defendant exercised ordinary care.

IV R. at 1461. In particular, A.B. Chance objects to the last sentence of the instruction. After considering the instruction as a whole, we conclude that it is consistent with Kansas law and the district court did not err in giving it to the jury. *See Rexrode v. American Laundry Press Co.*, 674 F.2d 826, 832 (10th Cir. 1982) (finding, in a Kansas product liability case, standard that became effective after the product's manufacture date to be "at best remote.").

3. Refusal to Include A.B. Chance's Instruction

Finally, A.B. Chance asserts that the district court erred by refusing to include its proposed instruction on substantial change or alteration. The proposed instruction reads:

> A manufacturer is not liable when the cause of an accident was a substantial change or alteration in the product. A substantial change or alteration means that the configuration or operational characteristics of the product are changed or altered by affirmative conduct of some person in a manner that the defendant could not reasonably have foreseen would occur in the intended or foreseeable use of the product.

IV R. at 1347. A.B. Chance claims that the court's failure to include the instruction left the jury with "the impression that substantial alteration was merely a factor to consider in assessing comparative fault, rather than being a bar to any liability on the part of A.B. Chance." Aplt. Br. at 47-48. Again, we review the court's instructions "as a whole to determine whether they properly stated the applicable law and provided an ample understanding of the applicable standards." *Dillard & Sons Construction, Inc.*, 51 F.3d at 915.

Under Kansas law, a manufacturer may not be held liable for a product's defective design where, after the product leaves the manufacturer's possession or control, there is an unforeseeable substantial modification to the product, and the accident would not have occurred but for the substantial modification. *See Howard v. TMW Enterprises, Inc.*, 1998 WL 918320, at *6 (D. Kan. 1998); *Mason v. E.L. Murphy Trucking Co.*, 769 F. Supp. 341, 345 (D. Kan. 1991). Thus, we must determine whether the court's instructions as a whole allowed the jury to consider this defense.

The charge given, considered as a whole, defines alteration in such a manner as to allow the jury to draw the inference sought by the rejected instruction. It is apparent that the district court regarded the alteration defense as going to the general issue in the case and instructed the jury that there is no liability if the product was not defective or substantially altered. *See* IV R. at 1462, 1464-65. The issue is not whether the instructions are faultless in every particular, and while it would have been preferable to give A.B. Chance's proposed instruction, the instructions given to the jury allowed it to consider alteration as a bar to liability. Such a theory was argued. *See*

III R. at 1198, 1203, 1208-09. In these circumstances, we decline to find reversible error.

AFFIRMED.

Entered for the Court

PAUL J. KELLY, JR.
Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 97-3377

MAE ENFIELD, conservator and natural mother of
JERRY ALLEN ENFIELD,
Plaintiff-Appellee,

v.

A.B. CHANCE COMPANY, and
EMERSON ELECTRIC COMPANY,
Defendants-Appellants.

CITY OF GOODLAND, KANSAS,
Intervenor.

ORDER

Filed April 30, 1999

Before KELLY, McKAY, and LUCERO, Circuit Judges.

Appellant A.B. Chance Company's petition for rehearing is denied.

Entered for the Court
PATRICK FISHER
Clerk of Court

by: /s/ Amy Frazier
Deputy Clerk

APPENDIX C

INSTRUCTION NO. 16

A manufacturer has a strict duty of care in design and production, including the duty to guard against injury to ordinary and even negligent consumers. If you find defendant breached this duty, you may consider it in determining the comparative fault of the parties.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

No. 94-1423-JTM

JERRY ALLEN ENFIELD,
by and through his Conservator
and Natural Mother, MAE ENFIELD,
Plaintiff,

v.

A.B. CHANCE COMPANY
Defendant,

THE CITY OF GOODLAND, KANSAS,
Intervenor.

VERDICT

We, the jury, impanelled and sworn in the above entitled case, upon our oaths, do make the following answers to the questions propounded by the court:

1. Do you find any of the parties to be at fault?

X Yes — No

[Proceed to question 2 only if you answered "yes" to question 1.]

2. Considering all of the fault at one hundred percent, what percentage of the fault is attributable to each of the following parties:

A.B. Chance Co.	(0%-100%)	50%
City of Goodland	(0%-100%)	50%
Independent Testing Laboratory	(0%-100%)	0%
Total		100%

3. Without considering the percentage of fault set forth in question 2, what damages do you find were sustained by plaintiff, Jerry Enfield?

A.	Noneconomic loss to date	$ 50,000
B.	Future noneconomic loss	$ 332,000
C.	Medical expenses to date	$ 411,171
D.	Future medical expenses	$2,170,900
E.	Economic loss to date	$ 144,971
F.	Future economic loss	$ 356,962

4. Our finding of monetary damages for noneconomic loss stated at lines 3A and 3B above includes $285,000 for pain and suffering.

Date: 10 November 1997

/s/ E. D. Brown
Presiding Juror

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 94-1423-JTM

JERRY ENFIELD,
by and through his Conservator
and Natural Mother, MAE ENFIELD,
Plaintiff,

vs.

A.B. CHANCE COMPANY and
EMERSON ELECTRIC COMPANY,
Defendants.

THE CITY OF GOODLAND, KANSAS,
Intervenor.

JUDGMENT IN A CIVIL CASE

This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that plaintiff is awarded judgment against defendant A.B. Chance Company in the amount of $1,733,002.00 with interest thereon at the rate provided by law.

IT IS FURTHER ORDERED by the court that plaintiff's claims against defendant Emerson Electric Company are dismissed without prejudice based upon Emerson's representation on the record that it will indemnify Chance

for any unsatisfied judgment rendered against Chance in this case.

APPROVED:

RALPH L. DELOACH
Clerk

/s/ J. Thomas Marten
J. THOMAS MARTEN
JUDGE

By /s/ Ruth Thompson
Deputy Clerk

November 10, 1997
Date

FILED
AUG 23 1999
OFFICE OF THE CLERK

No. 99-195

In The

Supreme Court of the United States

A.B. CHANCE COMPANY,

Petitioner,

v.

JERRY ALLEN ENFIELD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JAMES E. OLDS, LTD.
JAMES E. OLDS
JEAN SEABURG
200 Division Street South
P.O. Box 310
Northfield, Minnesota 55057
(507) 663-1033

BOB GOULD LAW OFFICES, CHTD.
CARSTON C. JOHANNSEN
(Counsel of Record)
9728 Rosehill
Lenexa, Kansas 66125
(913) 599-5192

LAW OFFICES OF DONALD W. VASOS
DONALD W. VASOS
DAVID A. HOFFMAN
4400 Shawnee Mission Parkway
Suite 100
Shawnee Mission, Kansas 66025
(913) 362-4400

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Tenth Circuit's determination that the jury instructions in this personal injury case as a whole adequately reflected Kansas products liability law merits this Court's plenary review?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 1

I. PETITIONER FAILED TO RAISE AND PROPERLY PRESERVE ANY *ERIE* ISSUE IN THE COURTS BELOW 2

II. THE TENTH CIRCUIT'S INTERPRETATION OF KANSAS PRODUCTS LIABILITY LAW IS CORRECT AND, IN ANY EVENT, RAISES ONLY A STATE LAW QUESTION THAT DOES NOT MERIT THIS COURT'S REVIEW 4

A. The Tenth Circuit Correctly Interpreted Kansas Law 4

B. The Jury Instructions Accurately Stated Kansas Law 8

III. THERE IS NO CIRCUIT SPLIT ON THE *ERIE* DOCTRINE 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Albertson v. Volkswagenwerk Aktiengesellschaft, 230 Kan. 368, 634 P.2d 1127 (1981) 5

Brooks v. Dietz, 218 Kan. 698, 545 P.2d 1104 (1976) 4

California v. Brown, 479 U.S. 538 (1987) 8

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 1, 2, 3, 11

Jenkins v. Amchem Products, Inc., 256 Kan. 602, 886 P.2d 869 (1994) 4

Jones v. Hittle Service, Inc., 219 Kan. 627, 549 P.2d 1383 (1976) 11

Kennedy v. City of Sawyer, 228 Kan. 439, 618 P.2d 768 (1980) 5

Medlock v. Ortho Biotech, Inc., 164 F.3d 545 (10th Cir. 1999) 8

Prince v. Leesona Corp., 720 F.2d 1166 (10th Cir. 1983) 6, 7

Salve Regina College v. Russell, 499 U.S. 225 (1991) 11, 12

Trout v. Koss Constr. Co., 240 Kan. 86, 727 P.2d 450 (1986) 11

Wheeler v. John Deere Co., 862 F.2d 1404 (10th Cir. 1988) 2, 5, 6, 7, 8

OTHER AUTHORITIES

Supreme Court Rule 15.2 2

Kansas Pattern Instructions – Civil § 128.17 (3d ed. 1997) 5, 9

Restatement (Second) of Torts, § 402A 4, 10

Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* (7th ed. 1993) 2

STATEMENT OF THE CASE

Petitioner accurately sets forth the claims it made against the intervenor City of Goodland. However, Petitioner's statement of the case omits information important to placing Respondent's claims against Petitioner in the proper context.

At trial, Respondent presented overwhelming evidence to support his dual theories of negligence and strict product liability. Respondent demonstrated, *inter alia*, that Petitioner designed, manufactured and sold a digger-derrick with bolt specifications that had an inadequate margin of safety. The Petitioner manufactured a top-plate that was wavy instead of flat, in spite of the fact that Petitioner's own plans and specifications call for a flat top-plate. Nor did Petitioner's maintenance manual instruct purchasers on the type of replacement bolts and washers to be used in routine maintenance of the machine. Respondent presented evidence, which the jury credited, that Petitioner's design and manufacturing defects proximately caused Petitioner's digger-derrick to fail and injure Respondent.

REASONS FOR DENYING THE WRIT

The petition for a writ of *certiorari* should be denied for at least three independent reasons, each discussed more fully below. First, Petitioner failed to properly preserve any *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), issue in the courts below. Second, the state law premise for Petitioner's *Erie* argument – that the Tenth Circuit has incorrectly interpreted Kansas products liability law – is

lacking and, in any event, involves a determination of state law that does not merit this Court's attention. Finally, there is no circuit split on the question Petitioner presents. For these reasons, Respondent respectfully requests that this Court deny the petition for a writ of *certiorari*.

I. PETITIONER FAILED TO RAISE AND PROPERLY PRESERVE ANY *ERIE* ISSUE IN THE COURTS BELOW

Pursuant to this Court's Rule 15.2, Respondent brings to the Court's attention the fact that Petitioner did not properly raise and preserve any *Erie* claim in the courts below. Nor did the Tenth Circuit address such a claim anywhere in its opinion. *See* Pet. App. 7a (one paragraph addressing the challenged jury instruction with no mention or discussion of the *Erie* doctrine). With all due respect, those omissions alone should result in the denial of the petition for a writ of *certiorari*. Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice*, at 370 (7th ed. 1993).

Petitioner completely failed to raise any *Erie* issue in the District Court at any point in the proceedings. Although Petitioner had every opportunity in the District Court to request certification of the Kansas products liability law issue to the Kansas Supreme Court, Petitioner failed to do so. Thus, despite knowledge that the federal District Courts in Kansas were relying upon and using the products liability jury instruction that the Tenth Circuit approved in *Wheeler v. John Deere Co.*, 862 F.2d 1404 (10th Cir. 1988), Petitioner apparently made a deliberate

choice not to raise an *Erie* objection prior to, during, or even immediately after the trial. Thus, Petitioner waived any *Erie* issue.

In its opening brief in the Tenth Circuit, as well as its reply brief, Petitioner neither mentioned the *Erie* doctrine or even cited the *Erie* case. Rather, Petitioner made three primary arguments in the Tenth Circuit: (1) the district judge erred in admitting certain evidence, including evidence of other accidents involving Petitioner's product; (2) the district judge erred in excluding evidence of the intervenor City's subsequent use of Petitioner's product; and (3) the district judge erred in giving two instructions (one being the instruction at issue in this petition) and in not giving a third. Only one of the asserted instructional errors is relevant to the question Petitioner now purports to present to this Court but, again, Petitioner did not challenge that instruction in the Tenth Circuit as a potential *Erie* problem.[1]

Not until it filed its unsuccessful motion for rehearing in the Tenth Circuit, after that Court had issued its decision in this case, did Petitioner even cite *Erie* in one of its filings. That is simply too late to preserve the issue for this Court's review.

---

[1] At the same time it filed its opening brief in the Tenth Circuit, Petitioner did file a motion to certify to the Kansas Supreme Court the issue whether, under Kansas law, "it is proper to instruct a jury that a manufacturer has a 'strict duty of care' in either a strict liability or negligence action?" The motion, like Petitioner's Tenth Circuit brief, neither cited *Erie* nor raised an *Erie* argument. Moreover, Petitioner never made such a motion in the District Court but, instead, waited until it filed its opening brief on appeal.

II. THE TENTH CIRCUIT'S INTERPRETATION OF KANSAS PRODUCTS LIABILITY LAW IS CORRECT AND, IN ANY EVENT, RAISES ONLY A STATE LAW QUESTION THAT DOES NOT MERIT THIS COURT'S REVIEW

A. The Tenth Circuit Correctly Interpreted Kansas Law

The basic premise of Petitioner's petition, that the Tenth Circuit created and then followed a new rule under Kansas product liability law, does not exist because the challenged jury instruction accurately stated Kansas products liability law.

Kansas has adopted the strict liability doctrine set forth in Restatement (Second) of Torts § 402A (1964), and its accompanying comments. *Jenkins v. Amchem Products, Inc.*, 256 Kan. 602, 630, 886 P.2d 869, 886 (1994) (citing *Brooks v. Dietz*, 218 Kan. 698, 545 P.2d 1104, 1108 (1976)). The Kansas pattern jury instruction on strict liability, which the Kansas Supreme Court has approved, *see id.*, and which the district court gave in this case, tracks the language of the Restatement. That pattern instruction provides as follows:

> A manufacturer who sells a product in a defective condition which is unreasonably dangerous to the user is subject to liability for physical harm thereby caused to the ultimate user, if:
>
> (1) The manufacturer is in the business of making such a product; and
>
> (2) It is expected that the product will reach and does reach the user without substantial change in the condition in which it was sold.

> The rule applies although the manufacturer has exercised all possible care in the preparation and sale of the product and although the user has not bought the property from or entered into any contractual relation with the seller.
>
> A product is in a defective condition if it has defects in design, manufacturing, or instructions, and such defects existed at the time the product left the manufacturer's hands.
>
> A defective condition is unreasonably dangerous if it is dangerous when used in the way it is ordinarily used considering the product's characteristics and common usage, and is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it, with the ordinary knowledge common to the community as to its characteristics.

Pattern Instructions Kansas-Civil § 128.17 (3d ed. 1997).

Thus, under Kansas law, a manufacturer may be held liable for injuries its product causes even though the manufacturer exercised all possible care, even the highest possible care, in the design and manufacture of the product. In this sense, the manufacturer's duty with respect to design and manufacture is a strict duty because it does not matter whether the manufacturer was negligent in the design and manufacture of its product. Further, negligence in the use of the product does not absolve the manufacturer, so long as the negligent use was foreseeable. *Albertson v. Volkswagenwerk Aktiengesellschaft*, 230 Kan. 368, 373, 634 P.2d 1127, 1131 (1981); *Kennedy v. City of Sawyer*, 228 Kan. 439, 618 P.2d 768, 798 (1980). The Tenth Circuit followed that rule of Kansas products liability law in *Wheeler v. John Deere Co.*, 862 F.2d 1404, 1412,

n. 6 (10th Cir. 1988) (recognizing that, under Kansas law, a manufacturer may still be liable for a user's foreseeable misuse of the product).

The concept of "misuse" may include the user's negligence. The focus under Kansas law is that the product was sold in a defective condition which was unreasonably dangerous to the user, that the manufacturer was in the business of making such a product, and that the manufacturer expected the product to, and it did, reach the user without substantial change in the condition in which it was sold. Respondent's overwhelming evidence at trial more than satisfied each of these elements.

Ultimately, the jury instruction about which Petitioner now complains, in particular the language that "a manufacturer has a strict duty of care in design and production, including the duty to guard against injury to ordinary and even negligent consumers," is a correct statement of the well-established Kansas products liability law principle that a manufacturer may be held liable for injuries caused by a defective and unreasonably dangerous product, even though the manufacturer may have exercised all possible care in design and manufacture.

The Tenth Circuit has not blindly followed predictive precedent. Petitioner claims that, in *Wheeler*, the Tenth Circuit announced that "strict duty of care" dicta from *Prince v. Leesona Corp.*, 720 F.2d 1166 (10th Cir. 1983), appeared to be a close enough approximation of Kansas law, at least "until the Kansas Courts tell us otherwise." Petition at 11. But Petitioner quotes *Wheeler* out of context. In truth, before approving the language Petitioner

now challenges, the *Wheeler* court first reviewed Kansas tort law as it applied to the instruction at issue. After noting that Kansas has incorporated concepts of fault into its strict product liability law, and after observing that before fault can be apportioned it is necessary to define the respective duties of the parties, the court stated "[t]hus, until the Kansas courts tell us otherwise, we cannot conclude that an instruction attempting to define those duties in strict liability is error." 862 F.2d at 1412-13.

The Tenth Circuit did not say that the duty described in the instruction that Petitioner belatedly challenges was the law until the Kansas courts indicate otherwise. Rather, it was simply recognizing that, until the Kansas courts indicated that an instruction pertaining to the duties of the parties was unnecessary in a strict liability case, it would not criticize federal district courts in Kansas for attempting to define those duties in diversity cases.

Further, the *Wheeler* court did not blindly approve the use or the content of the *Prince* footnote as an instruction. Indeed, the Tenth Circuit's only criticism of the instruction in *Wheeler* had to do with the assignment of a lower duty of care to the consumer than to the manufacturer. As part of its review of Kansas law, the *Wheeler* court noted that "because Kansas courts have not described the differing legal duties involved in strict product liability actions as comparatively 'lower' or 'higher,' on remand the district court should simply define the actors' respective duties without stating that the duties differ in degree." *Wheeler*, 862 F.2d at 1413, n. 6.

In this case, the district court followed *Wheeler* and omitted any reference to the actors' differing duties. Thus, contrary to Petitioner's claim, the history of this instruction shows that the Tenth Circuit has not blindly followed prior predictive opinions. Instead, in each case the Tenth Circuit has carefully reviewed Kansas products liability law and the jury instructions given in light of the particular facts of the case to ensure that the jury was given accurate guidance. The Tenth Circuit did the same in this case, reviewing its own prior decisions and then analyzing the instructions as a whole.

Not only was the Tenth Circuit's ultimate determination in this case correct, but its case-specific determination that the jury instructions as a whole accurately stated Kansas products liability law does not merit this Court's attention.

B. The Jury Instructions Accurately Stated Kansas Law

In the Tenth Circuit, Petitioner improperly asked the court to focus on a single phrase in a single jury instruction in a circumstance where the court was required to view the instructions as a whole. *California v. Brown*, 479 U.S. 538 (1987); *see also Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 552 (10th Cir. 1999). The Tenth Circuit rejected this common appellate ploy, properly reviewed the jury instructions as a whole,[2] and found that the instructions

---

[2] Before considering any of Petitioner's challenges to the jury instructions, the Tenth Circuit declared that "[w]e review *de novo* whether the district court's instructions, considered as a

accurately reflected Kansas law. Petitioner now invites this Court to engage in precisely the same kind of review that the Tenth Circuit properly declined.

Even a brief review of the instructions as a whole demonstrates that the jury was properly advised of the relevant Kansas law and was not misled in any way. Importantly, Respondent presented ample evidence that the digger-derrick Petitioner manufactured was defective and unreasonably dangerous. Petitioner does not and cannot contend otherwise. The case was submitted to the jury under both negligence and strict product liability theories. Respondent presented proof that the product was defective in both design and manufacture and that Petitioner failed to provide appropriate instructions on the use and maintenance of the product.

The sources of the instructions the district court gave were the Kansas Pattern Instructions 3d and instructions from previous cases that had been approved on appeal. Instruction 11 advised the jury that failure of a manufacturer to use ordinary care in the design of its product constitutes negligence. Instruction 12 stated that the manufacturer has a duty to reasonably inspect the manufactured product for any defects and that failure to do so is negligence. Instruction 13 explained that there is a duty to make such tests for defects as are reasonably necessary to assure safety of the product and that failure to do so constitutes negligence. The jury was then given Kansas Pattern Instruction, PIK 3d § 128.17 (quoted above),

---

whole, properly stated the applicable law and focused the jury on the relevant inquiry." Pet. App. 7a.[3]

which advised the jury that Respondent was entitled to recover under a strict products liability theory only if the evidence demonstrated each of the five elements required for recovery set forth in the Restatement (Second) of Torts § 402A. All of these instructions correctly stated Kansas law and correctly instructed the jury on the theories presented.

Because instructions 11 through 13 specifically referred to negligence, it was incumbent upon the court to instruct the jury with respect to Petitioner's duty in the context of the strict liability claim. Under Kansas comparative fault principles, the failure to so define Petitioner's duty would arguably have been error. Instruction 16 simply advised the jury that Petitioner has a duty derived from strict liability to design and manufacture products that are not unreasonably dangerous to end users. The Tenth Circuit correctly concluded that this instruction, when reviewed in the context of the entire case and with all of the other instructions, adequately reflected Kansas law. Pet. App. 7a ("In light of this court's previous holdings and after analyzing the instruction[s] as a whole, we find that this instruction adequately reflects Kansas law").

Petitioner's conclusion that the phrase "strict duty of care" equates to "absolute liability" and transforms Petitioner into Respondent's personal insurer is erroneous. Petitioner provides no citation of authority for its conclusion that a single phrase in one instruction imposed absolute liability equal to that of an insurer. Nor does Petitioner define what it means by this mythical standard. Without definition it must be assumed that Petitioner means that the phrase allegedly imposed liability without

fault. *Jones v. Hittle Service*, Inc., 219 Kan. 627, 549 P.2d 1383, 1388 (1976). However, the instruction Petitioner now attacks concludes by informing the jury that it must decide the case on the basis of comparative fault.[3]

III. THERE IS NO CIRCUIT SPLIT ON THE *ERIE* DOCTRINE

Petitioner incorrectly asserts that there is a split in the circuits on the *Erie* doctrine. First, Petitioner's argument, as the Petition makes clear at pages 17-19, is premised on the erroneous proposition that the Tenth Circuit has incorrectly interpreted Kansas products liability law. In order to even reach the contention that a circuit split exists, this Court would first have to decide that pure question of state law in Petitioner's favor. With all due respect, the correct interpretation of Kansas products liability law is not an issue that merits this Court's plenary review.

In any event, Petitioner's alleged Circuit split is nothing more than a game of semantics. Putting aside this Court's decision in *Salve Regina College v. Russell*, 499 U.S.

---

[3] Moreover, Petitioner's argument that a single phrase in a single jury instruction has the effect of charging Petitioner with absolute liability does not comport with the manner in which instructions are reviewed under Kansas law. The Kansas Supreme Court has declared that "[i]nstructions in any particular action are to be considered together and read as a whole, and where they fairly instruct the jury on the law governing the case, error in an isolated instruction may be disregarded as harmless. If the instructions are substantially correct, and the jury could not reasonably be misled by them, the instructions will be approved on appeal." *Trout v. Koss Constr. Co.*, 240 Kan. 86, 88-89, 727 P.2d 450 (1986).

225 (1991), which has nothing to do with the issue Petitioner purports to present here,[4] Petitioner's alleged conflict boils down to mere differences in words the Circuits use to describe their application of *stare decisis* principles when interpreting state law.

A common sense reading of the various decisions Petitioner cites demonstrates that there is no practical difference between the Circuits' approaches to *stare decisis* in the context of interpreting state law. There simply is no meaningful difference between a Circuit declaring that *stare decisis* requires it to follow its own prior decisions predicting state law unless intervening state cases tend "to cast doubt" on Circuit precedent (Second Circuit), and a Circuit instead phrasing the inquiry as whether there is "persuasive evidence" of a change in state law (Third Circuit), a "clearly contrary subsequent holding of the highest court of the state" (Fifth Circuit), "an indication" of a change in state law (Sixth Circuit), or "intervening

---

[4] In *Salve Regina College v. Russell*, 499 U.S. 225 (1991), the sole question was whether the Courts of Appeal should apply *de novo* review or, instead, some sort of deferential review to district court decisions interpreting state law in diversity cases. There was no issue of *stare decisis*, *i.e.*, whether a Court of Appeals should follow its own prior decisions interpreting state law. Ultimately, this Court held that a *de novo* standard of review is appropriate when the Courts of Appeal review any legal question, whether based on federal or state law. Even so, this Court did not purport to alter or undermine its own traditional practice of not expending its limited resources engaging in determinations of state law. *Id.* at 235 n. 3 ("We are not persuaded that the manner in which this Court chooses to expend its limited resources in the exercise of its discretionary jurisdiction has any relevance to the obligation of courts of appeals to review *de novo* those legal issues properly before them").

controlling authority" from the state courts (Ninth Circuit). The terms various Circuits use in describing the applicable and identical *stare decisis* principles are simply semantic differences, with no substantive or logical difference in their effect.

Ultimately, Petitioner's complaint distills to the sole proposition that the Tenth Circuit incorrectly interpreted Kansas products liability law on an issue that the Kansas courts have not yet fully and explicitly addressed and resolved. That proposition does not merit this Court's attention.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of *certiorari*.

Respectfully submitted,

JAMES E. OLDS, LTD.
JAMES E. OLDS
JEAN SEABURG
200 Division Street South
P.O. Box 310
Northfield, Minnesota 55057
(507) 663-1033

BOB GOULD LAW OFFICES, CHTD.
CARSTON C. JOHANNSEN
(Counsel of Record)
9728 Rosehill
Lenexa, Kansas 66125
(913) 599-5192

LAW OFFICES OF DONALD W. VASOS
DONALD W. VASOS
DAVID A. HOFFMAN
4400 Shawnee Mission Parkway
Suite 100
Shawnee Mission, Kansas 66025
(913) 362-4400

August 1999

Supreme Court, U.S.
FILED
AUG 27 1999
OFFICE OF THE CLERK

No. 99-195

IN THE
Supreme Court of the United States

A.B. CHANCE COMPANY,
a subsidiary of EMERSON ELECTRIC COMPANY,
Petitioner,

v.

JERRY ALLEN ENFIELD, by and through his Conservator and Natural Mother, MAE ENFIELD,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN M. KOBAYASHI, ESQ.*
SUSAN G. PRAY, ESQ.
MICHELE R. LAMONTAGNE, ESQ.
BENNETT L. COHEN, ESQ.
THE KOBAYASHI LAW FIRM, P.C.
1633 Fillmore Street
Denver, CO 80206
(303) 399-2100
Counsel for Petitioner
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

11 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
A. Petitioner Properly Preserved Its Objection to the Erroneous Jury Instruction at Issue in This Case	2
B. The Aspect of the State Law Determination at Issue in This Petition Is a Matter of Federal Appellate Practice, Which Did Not Emerge Until the Tenth Circuit Issued Its Opinion	4
CONCLUSION	8

TABLE OF AUTHORITIES

CASES	Page
Bishop v. Wood, 426 U.S. 341 (1976)	5
Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)	*passim*
Salve Regina College v. Russell, 499 U.S. 225 (1991)	7
Wheeler v. John Deere Co., 862 F.2d 1404 (10th Cir. 1988)	6

IN THE

Supreme Court of the United States

No. 99-195

A.B. CHANCE COMPANY,
a subsidiary of EMERSON ELECTRIC COMPANY,
Petitioner,

v.

JERRY ALLEN ENFIELD, by and through his Conservator and Natural Mother, MAE ENFIELD,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner, A.B. Chance Company, through its indemnitor, Emerson Electric Company, and its counsel, The Kobayashi Law Firm, P.C., pursuant to Supreme Court Rule 15.6, respectfully submits this Reply Brief to Respondent Jerry Allen Enfield's Brief in Opposition to Petitioner's Petition for Writ of Certiorari.

In their Opposition Brief, Respondents raise three arguments in opposition to the Petition:

1. Respondents argue that Petitioner has waived all issues pertaining to the doctrine of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938);

2. Respondents argue that the Tenth Circuit Court of Appeals correctly interpreted Kansas Law, or the Tenth Circuit's misinterpretation of Kansas law is too minor a matter to merit this Court's attention; and

3. Respondents argue that there is no split among the circuits concerning the application of *stare decisis* to *Erie*-predictive precedent.

The latter two arguments do not present any new material as contemplated by Supreme Court Rule 15.6, and Petitioners therefore will not address these issues. The argument that Petitioners have somehow waived the *Erie* issue, however, is a new matter that merits a reply. As set forth below, Petitioner properly preserved the error in the jury instruction which underlies this case. The aspect of this error which is stressed in the Petition for Certiorari—the *stare decisis* value of *Erie*-predictive precedent—is a question of federal appellate practice which is properly before this Court even though it could not have been raised in the district court, or indeed until after the entry of the circuit opinion in this case.

A. Petitioner Properly Preserved Its Objection to the Erroneous Jury Instruction at Issue in This Case.

The erroneous jury instruction underlying this Petition was instruction number 16, which saddled Petitioner with a "strict duty of care" to guard against injury to even negligent users such as the Respondent. It was submitted during trial by the City of Goodland, Kansas, only two days before the conference on jury instructions. The instruction reads:

> A manufacturer has a *strict duty of care* in design and production, *including the duty to guard against injury to ordinary and even negligent consumers.*

> If you find defendant breached this duty, you may consider it in determining the comparative fault of the parties. (emphases added)

See Appendix C to the Petition at p. 12a. As argued in the Petition for Certiorari, this "strict duty of care" instruction has absolutely no basis in Kansas law, and is in fact directly contrary to authoritative statements of Kansas law concerning absolute liability of manufacturers. *See* Petition at p. 5. This erroneous misstatement of Kansas law was spawned from *dicta* in a footnote of a federal opinion, from whence it became entrenched into the federal caselaw. *Id.* at pp. 9-12. Kansas courts have never adopted or approved of this "strict duty of care" concept. *Id.* at p. 11.

Federal Rule of Civil Procedure 51 requires that parties lodge timely and specific objections to jury instructions in order to preserve error for review:

> No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

F.R.C.P. 51.

At the conference reviewing the jury instructions, A.B. Chance lodged the following objection to instruction number 16:

> THE COURT: Instruction Number 15: No objections.
>
> Instruction Number 16.
>
> [A.B. CHANCE]:Yes, I object to that one. [I]t states an improper standard of the duty of care. [The proper standard is] an ordinary duty of care outlined in Instruction Number 10.

> THE COURT: [I] overrule the objection to Instruction Number 16. I think it's an accurate statement of the law.

Trial transcript, 11/6/97 at p. 1128. Petitioner thus properly preserved the error in instructing the jury on the spurious "strict duty of care" as required by F.R.C.P. 51; the objection was timely, specific, and even explained to the district court the precise error in the instruction. This is precisely the sort of objection contemplated by F.R.C.P. 51; indeed, Respondent never suggested in the court of appeals that this issue was waived.

B. The Aspect of the State Law Determination at Issue in This Petition Is a Matter of Federal Appellate Practice, Which Did Not Emerge Until the Tenth Circuit Issued Its Opinion.

Acknowledging that Petitioner properly satisfied the preservation requirements of F.R.C.P. 51, Respondent argues that Petitioner failed to preserve any *Erie* issue for review because Petitioner did not raise any *Erie* arguments in the district court. Opposition Brief at 2-3. This argument is fallacious because the problem of the *Erie* doctrine's impact upon the *stare decisis* value of federal predictions of state law did not emerge and indeed could not emerge until after the Tenth Circuit issued its opinion in this case.

Petitioner's objection in the district court fully explained why the "strict duty of care" instruction was wrong: because Kansas law imposed no such duty, but rather required manufacturers to exercise ordinary care under the circumstances. There was no reason to launch into an extended discussion of the *Erie* doctrine in the district court; indeed, the district court judge would likely have found any detailed *Erie* argument to be pedantic, esoteric and useless in the context of a fast-paced and time sensi-

tive trial. Respondent's contention that Petitioner should have sought to certify the accuracy of the instruction to the Kansas Supreme Court is even more far-fetched. *See* Opposition Brief at 2. The district court judge would not likely have interrupted a long and complex trial on the eve of closing arguments to permit Petitioner to file a certification motion in order to clarify the accuracy of one instruction. No trial court would.

Rather, the district court's concern was properly limited to the narrow question of whether the "strict duty of care" instruction was an accurate statement of Kansas law. Petitioner argued that it was not and explained why; the district court overruled the objection; and the trial moved forward. That is all the preservation that is required and can be expected by the Federal Rules of Civil Procedure.

The Tenth Circuit's concern, like the district court's, was similarly focused on the accuracy of the "strict duty of care" instruction. A dissertation on the *Erie* doctrine was hardly necessary in Petitioner's appellate briefs in the Tenth Circuit, because that court was obliged to correct the erroneous instruction simply because it was erroneous. It was enough to present to the circuit court the argument and authorities that the district court ignored, which established that the concept of a "strict duty of care" is completely foreign to Kansas law, and that the instruction was erroneous. *See* Opening Brief at pp. 19, 43-44.[1]

---

1 While these reasons for correcting the district court's error in instructing on a "strict duty of care" were sufficient to raise before the district and circuit courts, this Court has announced that it generally will not use its certiorari power to review questions of the accuracy of federal interpretations of state law. *See Bishop v. Wood*, 426 U.S. 341, 346-47 & n.10 (1976). Thus, if the district court and the Tenth Circuit had done nothing more than make a simple mistake in interpreting Kansas law, Petitioners would not be petitioning this Court for certiorari review.

The role of the *Erie* doctrine, and the specific problem of the *stare decisis* value of *Erie*-predictive precedent did not become an issue until the Tenth Circuit issued its opinion in which it refused to examine the accuracy of the "strict duty of care" instruction, but instead blindly deferred to its prior precedents in which it held that the "strict duty" concept appeared to be a close enough approximation of Kansas law to serve until express correction arrived from the Kansas courts. *See* Appendix A to the Certiorari Petition at p. 7a; *Wheeler v. John Deere Co.*, 862 F.2d 1404, 1412-13 (10th Cir. 1988). It was precisely because the Tenth Circuit rationalized the district court's error through thoughtless adherence to its own *Erie*-predictive precedent that the *stare decisis* value of *Erie*-predictive precedent has emerged as the central issue in this Petition for Certiorari, and makes this case worthy of certiorari review by this Court. This aspect of the jury instruction was not discussed until the Petition for Rehearing for the obvious reason that it did not emerge as an issue until that point.

Once this *Erie* issue had emerged, Petitioner promptly filed a Petition for Rehearing in the Tenth Circuit which argued that the court's deference to its own inaccurate *Erie*-predictive precedent was both a violation of *Erie* and of fundamental principles of *stare decisis*. The Tenth Circuit again did not seriously consider this argument, but denied the Petition for Rehearing in a *per curiam* order.

The underlying error at issue in this case is and has always been the accuracy of the "strict duty of care" instruction, to which Petitioner properly objected and preserved for review. The specific *aspect* of this issue which is the focus of the Certiorari Petition—the Tenth Circuit's sacrifice of *Erie* values on its altar of *stare*

decisis—could not be raised in the district court because it is a matter of federal appellate practice.

This Court reviewed an issue in the exact same procedural posture in *Salve Regina College v. Russell*, 499 U.S. 225 (1991). Like here, the issue underlying the certiorari petition in *Salve Regina College* was the accuracy of the district court's determination of state law. The aspect of this question which this Court considered on certiorari review was the appropriate standard of review which the circuit courts should apply to the district court's state law determinations. This aspect of the state law determination obviously could not have been raised in the district court because it did not even exist until the circuit court had completed its appellate review and issued its opinion.

The certiorari issue in *Salve Regina College* was thus a question of federal appellate practice, which arrived at this Court through the vehicle of a district court determination of state law. Petitioner presents an identically-postured issue of federal appellate practice. Indeed, Respondent's absurd waiver argument would preclude this Court from reviewing any issues of federal appellate practice, because objections to such issues cannot be raised in the district court.

CONCLUSION

For the above reasons, the waiver argument in Respondent's Opposition Brief is utterly without merit, the Petition for Writ of Certiorari should be granted and a Writ of Certiorari should be issued.

Respectfully submitted,

JOHN M. KOBAYASHI, ESQ.*
SUSAN G. PRAY, ESQ.
MICHELE R. LAMONTAGNE, ESQ.
BENNETT L. COHEN, ESQ.
THE KOBAYASHI LAW FIRM, P.C.
1633 Fillmore Street
Denver, CO 80206
(303) 399-2100
Counsel for Petitioner

August 27, 1999

* Counsel of Record